75-1064

In the Supreme Court of the United States

Supreme Court, U. S.
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MICHAEL ROBAK, JR., CLERK

No. A—

JACK B. KREMENS, Individually and as Hospital Director of Haverford State Hospital; FRANK S. BEAL, Individually and as Secretary of Public Welfare of the Commonwealth of Pennsylvania; WILLIAM B. BEACH, JR., Individually and as Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania,

Appellants

v.

KEVIN BARTLEY; STEVE GENTILE; LESLIE LEVINE; VICKI MATHEWS; MARK WEAND; Minors, Through Their Next Friend, Individually and on Behalf of All Others Similarly Situated,

Appellees

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania

JURISDICTIONAL STATEMENT

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CITATION TO OPINION BELOW

The opinion of the lower court is reported at 402 F. Supp. 1039. The final order of the lower court is not published but is included in the Appendix at page 97a.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1253 in that this appeal is taken from an order granting a permanent injunction in a civil action required to be tried by a district court of three judges. This appeal is timely in that this action was filed November 16, 1972, the decision of the three judge court was entered July 24, 1975, and the final order of the three-judge court was entered on November 17, 1975. This appeal was taken on November 28, 1975.

CONSTITUTIONAL PROVISIONS INVOLVED

Eleventh Amendment to the Constitution of the United States:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

The Pennsylvania Mental Health and Mental Retardation Act of 1966, section 402 (Act of Oct. 20, 1966, Special Sess. No. 3, P. L. 96, art. IV, §402) is set forth as follows:

"(a) Application for voluntary admission to a facility for examination, treatment and care may be made by:

(1) Any person over eighteen years of age.

(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

(b) When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he may be admitted.

(c) Except where application for admission has been made under the provisions of section 402 (a) (2) and the person admitted is still eighteen years of age or younger, any person voluntarily admitted shall be free to withdraw at any time. Where application has been made under the provisions of section 402 (a) (2), only the applicant or his successor shall be free to withdraw the admitted person so long as the admitted person is eighteen years of age or younger.

(d) Each admission under the provisions of this section, shall be reviewed at least annually by a committee, appointed by the director from the professional staff of the facility wherein the person is admitted, to determine whether continued care is necessary. Said committee shall make written recommendations to the director which shall be filed at the facility and be open to inspection and review by the department and such other persons as the secretary by regulation may permit.

Where the admission is under the provisions of 402 (a) (2), the person admitted shall be informed at least each sixty days of the voluntary nature of his status at the facility."

The Pennsylvania Mental Health and Mental Retardation Act of 1966, section 403 (Act of Oct. 20, 1966, Special Sess. No. 3, P. L. 96, art. IV, §403) is set forth as follows:

"(a) Application for voluntary commitment to a facility for examination, treatment and care may be made by:

(1) Any person over eighteen years of age.

(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

(b) The application shall be in writing, signed by the applicant in the presence of at least one witness. When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he shall be committed for a period not to exceed thirty days. Successive applications for continued voluntary commitment may be made for successive periods not to exceed thirty days each, so long as care or observation is necessary.

(c) No person voluntarily committed shall be detained for more than ten days after he has given written notice to the director of his intention or desire to leave the facility, or after the applicant or his successor has given written notice of intention or desire to remove the detained person.

(d) Each commitment under the provisions of this section shall be reviewed at least annually by a committee, appointed by the director from the professional staff of the facility wherein the person is cared for, to determine whether continued care and commitment is necessary. Said committee shall make written recommendations to the director which shall be filed at the facility and be open to inspection and review by the department and such other persons as the secretary by regulation shall permit.

Where the commitment is under the provisions of section 403(a)(2), the person committed shall be informed at least each sixty days of the voluntary nature of his status at the facility."

The Pennsylvania Mental Health and Mental Retardation Act of 1966, section 426 (Act of Oct. 20, 1966, Special Sess. No. 3, P. L. 96, art. IV, §426) is set forth as follows:

"(a) Every person committed or detained in a facility by reason of the provisions of this act or anyone acting on his behalf, may at any time, petition for a writ of Habeas Corpus and, except as hereinafter provided, said petition shall be filed in accordance with the provisions of the act of May 25, 1951 (P. L. 415).

(b) Said petition may be based upon the following grounds:

(1) The insufficiency or illegality of the proceedings leading to such person's commitment, or,

(2) Although the commitment proceedings were proper, such person's continued detention or hospitalization is not warranted by reason of mental disability. Where the petition is based on this ground; (i) it shall be accompanied by the affidavit of a physician stating that he has examined the person and is of the opinion that such person is not mentally disabled, or that such mental disability does not require care or treatment in a facility, and (ii) the burden of proof shall rest upon the director responsible for such person's continued detention.

(c) Jurisdiction and venue is hereby conferred upon the several courts of the Commonwealth to issue writs of Habeas Corpus filed under this act as follows:

(1) A petition filed under section 426(b)(1) may be filed: (i) where committed by a court, only in the same court, or (ii) where committed under sections 404 or 405 of this act, only in the court of the county where the application for commitment was made.

(2) A petition filed under section 426(b)(2) may be filed: (i) in the court which committed such person or the court of common pleas of the county where he is detained if a civil commitment was ordered, or (ii) where a criminal charge is pending, in the court having jurisdiction of the charge or which committed him or the court of the county where he is detained, or (iii) where committed by a court where a criminal act was in any way otherwise involved in the proceedings leading to commitment, only in the same court which committed such person.

(3) If any petition under section 426(b)(2) is filed in a court other than the court of the county in which the person is detained, the petition may be transferred for disposition by the court in which it was filed to the appropriate court of the county in which the person is detained."

42 U.S.C. §1983 provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

I. The lower court's holding that parents may not waive the constitutional rights of their juveniles is both novel and erroneous.

II. The retroactive injunctive relief granted by the lower court is improper.

III. The retroactive relief ordered by the three judge court below violates the Eleventh Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

On November 16, 1972 the plaintiffs instituted this civil rights action challenging the constitutionality of certain portions of Pennsylvania's Mental Health and Mental Retardation Act of 1966. Specifically the plaintiffs sought *inter alia* declaratory and injunctive relief from the operation of sections 402 and 403 of Pennsylvania's Mental Health and Mental Retardation Act [1] which generally provide the procedures for the admission and voluntary commitment of juveniles to Pennsylvania's Mental Health and Mental Retardation facilities.[2]

The plaintiffs in this class action were juveniles who had been placed in mental health facilities under the provisions of these statutes. These plaintiffs asserted that they were involuntarily admitted and committed at the hands of their parents or guardians pursuant to the above mentioned statutes and that such placement without *inter alia* a hearing violated their rights to equal protection and due process of law.

On February 13, 1973 a three-judge court was convened and after several hearings that court issued its opinion on July 24, 1975 wherein it found that sections 402 and 403 of the Act violated the due process clause of the Fourteenth Amendment. Specifically the Court

[1] These sections are set forth in full at pp. 4, 5 & 6 supra.

[2] Throughout the remainder of this Jurisdictional Statement mental health and mental retardation facilities will be referred to as simply "mental health facilities" and the Mental Health and Mental Retardation Act of 1966 will be referred to as "the Act".

found that parents could not constitutionally waive their children's due process rights in relation to the child's admission or commitment to a mental health facility (37a). In addition to declaratory relief the Court also granted extensive prospective and retroactive injunctive relief (97a-106a).

On November 28, 1975 this appeal was taken generally seeking review of both the lower court's findings and the nature of the relief ordered. After denial by the lower court this Court granted the appellants' request for a stay of the lower court's order on December 16, 1975.

THE QUESTIONS ARE SUBSTANTIAL

I. The Lower Court's Holding That Parents May Not Waive the Constitutional Rights of Their Juveniles Is Both Novel and Erroneous

The lower court made essentially three legal determinations which appellants presently seek review of by this Court. First it was determined that sections 402 and 403 of the Mental Health Act as well as the regulations promulgated thereunder, were facially unconstitutional on due process grounds.[3] Next the lower court found that parents and those standing in loco parentis could not effectively waive these due process rights of their children. And finally the Court prescribed an elaborate array of procedural rights which must be afforded in order to continue allowing admission or commitment of juveniles to the state's mental health facilities. The adverse effects of these erroneous findings stretch from the individual juvenile in need of care, through the family unit to various state mental health programs throughout the country.[4]

[3] These regulations are reproduced in the majority opinion at n. 5, pp. 25a-27a. See dissenting opinion of Broderick, J., pp. 52a-61a.

[4] The following state statutes permit parents to voluntarily commit their children to mental institutions: Alaska Stat. Sec. 47.30.020; A. R. S. (Ariz.) Secs. 36-502, 36-504; Ark. Stat. Ann. Sec. 59-405; Cal. Welf. & Inst. Code Sec. 6000; Colo. Rev. Stat. Ann. Sec. 71-1-2; 16 Del. C. Sec. 5121; D. C. Code Ann. Secs. 21-511, 21-512; Fla. S. A. Sec. 394, 465; Ga. Code Ann. Sec. 88-503.1; Hawaii R. S. Sec. 334-52; Idaho Code Ann. Secs. 66-318, 66-320; Ind. Stat. Ann. Sec. 22-1205; Ky. R. S. Sec. 202.015; 34 M. R. S. A. (Maine) Secs. 2291, 2293; Md. Ann. Code, Art. 59, Sec. 11(g); Mass. G. L. A. Ch. 123, Secs. 10, 11; Mich. C. L. A. Sec. 303.19a; Minn. Stat. Ann. Sec. 253A 03 subdiv. 1 and 2; V. A. M. S. (Missouri) Secs. 202.783, 202.790; Mont. Rev. Codes Ann. Sec. 38-406.2; Nev. R. S., Sec. 433.665; N. H. R. S. A. Secs. 135:22, 135:-22-a; N. J. S. A. Secs. 30:4-46, 30:4-48; N. M. Stat. Ann. Secs. 34-2-2, 34-2-4(2); N. Y. Mental Hygiene Law Sec. 71; N. D. Century Code Secs. 25.03-01, 20-03-06(2); Ohio Rev. Code Ann. Secs. 5122.02, 5122.03(A)(2); 43 Okl. St. Ann. Sec. 184; O. R. S. (Oregon) Sec. 426.220; Pa. Stat. Ann. tit. 50, Secs. 4402, 4403; S. C. Code Sec. 32-951; Tenn. Code Ann. Sec. 33-601; Utah Code Ann. Sec. 64-7-29; 18 V. S. A. (Vermont) Secs. 7503, 8001; Va. Code Ann. Sec. 37.1-65; R. C. W. A. (Washington) Secs. 72.23.-070, 72.23.090; W. Va. Code Ann. Secs. 27-4-1, 27-4-3; W. S. A. (Wisc.) Sec. 51.10; Sec. 25.54, W. S. (Wyoming).

The lower court's holdings regarding the due process rights of juveniles with respect to admission or commitment to a mental health facility is completely without precedent. This Court specifically excepted from its decision in *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972), any pronouncement on the proper balancing of the interests of the state, family, and juvenile member of the family when such interests potentially clash.[5]

The lower court's ruling mandates a complete adversary judicial proceeding before responsible parents can secure the professional care and treatment they deem necessary for their mentally handicapped children. Just

[5] The only authority remotely approaching the holding in this case counsel has been able to find are the unreported opinion in *Saville v. Treadway,* F. Supp. (C.A. 6969, M.D. Tenn. 1974); and *Horacek v. Exon,* 354 F. Supp. 71 (D. Neb. 1974). Both of these cases are equally lacking in precedent for their holding regarding the due process rights of juveniles and the waivability thereof by their parents.

as the right of parents to educate their children is fundamental and not lightly interfered with *Wisconsin v. Yoder,* supra. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), the rights of parents to freely provide medical treatment for their children cannot be overlooked as is required by the lower court's opinion and order.[6]

Assuming arguendo that some measure of due process must be provided, clearly the lower court has provided an "overdose" of such procedural requirements. As the dissent suggests this holding may well mark the beginning of the end of voluntary admission and commitment of juveniles for necessary care and treatment.[7] At what cost we must ask do we then surrender this valuable service? The lower court has mandated a severe intrusion by the state into the normal sphere of decision making authority reserved for the family.[8] And again we must ask at what cost? And finally at what cost do we permit an adversarial barrier of due process to be erected between the parent and child in need of care and treatment in a mental health facility.

Fundamental concepts of familial existence are involved in this case. In view of the tremendous impact of this decision, and in view of the fact that the resolution of this case will drastically effect thousands if not millions of families nationally it is strongly urged that this Court review the opinion in this case.

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[6] In *Stanley v. Illinois,* 405 U.S. 645, at 651 (1972) this Court found that "[t]he rights to conceive and to raise one's children have been deemed essential." See also *Meyer v. Nebraska,* 262 U.S. 390, 399 and *Skinner v. Oklahoma,* 316 U.S. 535 (1942).

[7] Dissent at 52a.

[8] L. Tribe, "Supreme Court—Forward: Toward a Model of Roles in Due Process," 87 Harv. L. Rev. (1973).

II. The Retroactive Injunctive Relief Granted by the Lower Court Is Improper

The plaintiffs in this action were at all times attacking the very fact or duration of their confinement and they were seeking injunctive relief necessitating their immediate or speedier release.[9] In addition to the injunctive relief sought the plaintiffs requested damages and declaratory relief.[10]

The lower court, having found that Pennsylvania's Mental Health and Mental Retardation Act were facially unconstitutional on due process grounds, granted both declaratory and injunctive relief to the plaintiffs. As part of the injunctive relief it was ordered that the defendants were enjoined "to refrain from accepting or continuing the admission or commitment of any child . . ." who at that time was in, or was attempting to be admitted to, a mental health facility unless the child was provided the full panoply of prescribed due process rights within 120 days of the effective date of the Court's order.[11] In other words the lower court retroactively applied the injunctive aspects of its order which appellants contend is not permissible within the context of a civil rights action.

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[9] While the prayer for relief in the Complaint did not utilize the precise term "release" or some similar substitute therefore, the Complaint did request that the very statute which provided the sole basis by which the defendants were authorized to maintain custody of the plaintiffs be enjoined (16a). Further each of the named plaintiffs specifically complained of their—continued incarceration and set forth their desire to be released (6a-9a).

[10] (16a) Midway in the course of this litigation the plaintiffs relinquished their claims for damages.

[11] 103a-106a.

This Court has held in *Preiser v. Rodriguez*, 411 U.S. 475 (1972), that, to the extent that the remedy of habeas corpus may be available to protect the interests being advanced, that remedy must be utilized exclusively. As in *Preiser*, the plaintiffs in this action were clearly attacking the very basis of their custody, which attack this Court noted was "the essence of habeas corpus" *Id.* at 484.

However, in this case the plaintiffs also sought relief in the form of damages.[12] The question then arises whether or not claims for traditional habeas corpus relief can be resolved by federal courts ancillary to an apparent valid civil rights damage claim.

The answer which demonstrates the defect in the lower court's order in this case is found in the decision of this Court in *Wolff v. McDonnell*, 418 U.S. 539 (1973). In *Wolff* this Court held that a civil rights action for damages may provide the jurisdictional base for ancillary determination of claims for declaratory and injunctive relief which could have otherwise been obtained through habeas corpus. But, this Court noted very clearly that such injunctive relief may only be prospective in nature and then, as always, standing requirements must be met. The analogy being drawn and which is compelled by this Court's holding in *Wolff* is clear from the following language found, at pp. 554-5 of the opinion:

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[12] At p. 494 of *Preiser* this Court noted that "[I]f a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release, the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy."

"At the threshold is the issue whether under Preiser v. Rodriguez, 411 U.S. 475 (1973), the validity of the procedures for depriving prisoners of good-time credits may be considered in a civil rights suit brought under 42 U.S.C. §1983. In Preiser, state prisoners brought a §1983 suit seeking an injunction to compel restoration of good-time credits. The Court held that because the state prisoners were challenging the very fact or duration of their confinement and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus, 411 U.S. at 500, with the concomitant requirement of exhausting state remedies. But the Court was careful to point out that habeas corpus is not an appropriate or available remedy for damages claims, which, if not frivolous and of sufficient substance to invoke the jurisdiction of the federal court, could be pressed under §1983 along with suits challenging the conditions of confinement rather than the fact or length of custody. 411 U.S. at 494, 498-499.

The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under Preiser. But the complaint also sought damages; and Preiser expressly contemplated that claims properly brought under §1983 could go forward while actual restoration of good-time credits is sought in state proceedings. 411 U.S. at 499 n. 14. Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a dam-

ages award would not be barred by Preiser; and because under that case, only an injunction restoring good time improperly taken is foreclosed, *neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.*

We therefore conclude that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already canceled." [Emphasis supplied.]

Thus even assuming there existed plaintiffs with proper standing to seek the prospective injunctive relief, which is not at all clear or conceded, it was clear error under *Wolff* for the lower court to order the retroactive application of the injunctive relief.

The effect of the error committed by the lower court will not be minimal. In fact this Court was required to intervene in this case and stay the operation of the order of this case.[13] The lower court in this matter without ever formally involving the Commonwealth judicial branch of government ordered that all children then in the custody of any mental health facility[14] must either be discharged or recommitted pursuant to the provisions of the lower

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[13] U.S. (December 15, 1975).

[14] The lower court's order presumably covers all Pennsylvania Mental Health facilities notwithstanding the fact that approximately 150 of these facilities are private and only licensed by the Commonwealth.

court's decree within 120 days of the date of the order. The adverse effect of this order on the judicial branch of Pennsylvania's government was pointed out as follows by Chief Justice Jones of the Pennsylvania Supreme Court in a telegram directed to each member of this Court.

"ORDER APPEALED FROM CALLS FOR JUDICIAL INTERVENTION IN ESTIMATED SIX TO EIGHT THOUSAND CASES WITHIN FIVE MONTHS.[15] COURT ADMINISTRATOR OF PENNSYLVANIA PREPARING, TO INTERVENE IN THE ACTION, IF POSSIBLE, AND HE AND THIS COURT JOIN WITH THE COMMONWEALTH IN THE REQUEST FOR A STAY. FAILURE OF STAY WILL RESULT IN OVERWHELMING AND DISRUPTING THE JUDICIAL SYSTEM OF PENNSYLVANIA WHICH ARE ALREADY OVERLOADED WITH REGULAR COURT BUSINESS".[16]

Of course, it is not only Pennsylvania's judicial system that will suffer as a result of the effect of the lower court's order.[17] This order if allowed to go into effect will greatly undermine the delicate balance of judicial authority which has been created in our federal system of

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[15] The lower court's order actually requires completion of these hearings within 120 days (105a).

[16] The Supreme Court of Pennsylvania has informed counsel for appellants that upon notation of jurisdiction in this matter its counsel Bernard G. Segal will seek to proceed as *amicus curiae*.

[17] This clash between the federal and state judicial systems would have in large part been avoided if the lower court had not completely ignored traditional notions of federalism. See *Rizzo v. Goode*, U.S. , 44 U.S.L.W. 4095 (Jan. 21, 1976).

government. It is thus absolutely essential that this Court hear this appeal and determine to what extent a federal court can create new causes of action and order massive numbers of state judicial proceedings in state courts. [18]

Finally, as has already been pointed out the vast majority of the states have similar juvenile admission and commitment statutes which, if not already under attack, will undoubtedly be the subject of similar attacks in this ever-burgeoning area of mental health litigation.[19] Further, it should be noted that there are many mental health cases presently pending which in one way or another challenge the fact or duration of confinement on due process grounds, which cases will most probably involve similar *Preiser* and *Wolff* problems if such issues have not already arisen.[20]

Pennsylvania law provides a complete remedy for mental patients to challenge the legality of their confinement.[21] And instead of ignoring the state's law the lower court should have required that presently incarcerated patients assert their newly pronounced rights to due process by this means rather than to completely disrupt the judicial system of Pennsylvania by creating new forms of

[18] Fortunately questions of enforcement of the lower court's order have not and will not arise until further action by this Court as a result of the stay issued previously by this Court.

[19] See note 4 supra.

[20] See e.g. *Kidd v. Schmidt*, C.A. No. 74-6605 (E.D. Wisc., 3 J. Ct. 1974); *J. L. & J. R. Minors v. Parham*, 75-163-MAC (M.D. Ga., 3 J. Ct. 1975); *Goldy v. Beal*, C. A. 74-400 (M.D. Pa. 3 J. Ct. 1974); *Wallace v. Chancery Clerk of Chicksaw County*, E. C. 75-92-S (N.D. Miss. 1974); *Dixon v. Weinberger*, C. A. 74-285 (D.D.C. 1974); *Poe v. Weinberger*, C. A. 74-1800 (D.D.C. 3 J. Ct. 1974).

[21] See 50 P.S. §4426 set forth in full at pp. 6-8 supra.

action and severe time restrictions upon the completion of this massive amount of litigation.[22]

Overstatement of the importance of the issues raised by the retroactive application of the lower court's order in this case is difficult to conceive. Paramount considerations of federalism were totally ignored by the lower court in framing its equitable relief. The importance of such considerations has recently been noted by this Court:

> "When the frame of reference moves from a unitary court system, governed by the principles just stated, to a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief. Doran v. Salem Inn, Inc., 422 U.S. 922, 928 (1975)."
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> *Rizzo v. Goode,* U.S. , 44 U.S.L.W. 4095, 4100.

III. The Retroactive Relief Ordered by the Three-Judge Court Below Violates the Eleventh Amendment of the Constitution of the United States

The Eleventh Amendment of the Constitution of the United States has, since this Court's decision in *Hans v.*

[22] In this connection this Court is directed to the case of *Kendall v. True*, 391 F.S. 413 (W.D. Ky. 1975) where the Court properly refused to retroactively apply its injunctive order and required the then incarcerated patients to utilize the state remedies to pursue their release.

Louisiana, 134 U.S. 1 (1890), been held applicable to suits brought against an unconsenting state by a citizen of that same state. *Georgia Railroad & Banking Co. v. Redwine,* 342 U.S. 299 (1950); *Employees v. Department of Public Health & Welfare,* 411 U.S. 279 (1973).

Similarly, in determining the applicability of the Eleventh Amendment to a particular action, this Court has looked not only to the relief requested, *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682 (1949), but also to the relief actually ordered. *Minnesota v. Hitchcock,* 185 U.S. 373 (1902).

Upon examination of the nature and effect of the relief mandated below, appellants assert that the retroactive requirements of the order, raise substantial and novel questions under the Eleventh Amendment. Specifically this Court is rquested to review the propriety of a federal court clearly requiring allocations from a state's treasury to retroactively implement newly announced due process commitment standards, and also requiring a state officer to affirmatively exercise powers of the sovereign.

Since *Ex parte Young,* 209 U.S. 123 (1908), there has been no doubt as to a federal court's authority to entertain a suit against a state official, acting or threatening to act, under a statute alleged to be unconstitutional:

> "If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.* at 160.

Despite the doctrine of *Ex parte Young,* allowing a federal court to assert its jurisdiction over a state officer in his individual capacity, this Court has recognized certain limitations on the relief which may be afforded against the individual. As was stated in *Larson v. Domestic & Foreign Commerce Corp., supra:*

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. [Citation omitted]" *Id.* at 691 n. 11.

While *Larson* involved the federal government's sovereign immunity, the decision of this Court in *Edelman v. Jordan,* 415 U.S. 651 (1974), makes clear that relief requiring the disposition of unquestionably sovereign property, particularly monies from a state's treasury, is similarly barred by the Eleventh Amendment. Relying on *Ex parte Young,* this Court in *Edelman,* held that the retroactive award of wrongfully withheld AFDC benefits whether denominated as damages or equitable restitution, was barred by the Eleventh Amendment.

This Court's opinion in *Edelman* quotes with approval the words of Judge McGowen in *Rothstein v. Wyman,* 467 W. 2d 226 (2d Cir. 1972), where he observed that:

> "It is one thing to tell the Commissioner of Social Services that he must comply with the Federal standards for the future if the state is to have the bene-

fit of Federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force." 467 F. 2d at 236-37 (footnote omitted).

While it may be argued in the present case that the expenditure of funds for the recommitment hearings and for the provision of counsel required by the order below, is not the same as the monetary award contemplated in *Edelman,* this Court clearly met that issue by focusing on the impropriety of requiring an *allocation* from the state treasury to meet the requirements of the order:

". . . where the state has a definable allocation to be used in the payment of public aid benefits, and pursues a certain course of action such as the processing of applications within certain time periods as did Illinois here, the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will invariably mean there is less money available for payments for the continuing obligations of the public aid system." *Edelman,* 415 U.S. at 666 n. 11.

Similarly, Pennsylvania has already made an allocation for the representation of indigents as well as for the proceedings required under the various commitment sections of the Pennsylvania Mental Health and Mental Retardation Act. The order of the court below will necessarily mean that less money will be available to meet those already existing obligations.[23]

[23] Article 3, §24 of the Pennsylvania Constitution provides:

This Court in *Edelman* clearly found that retroactive relief requiring the direct payment of funds from the state treasury violated the Eleventh Amendment of the Constitution. This case raises the substantial question of whether the Eleventh Amendment is so transparent as to protect the sovereign states only from relief requiring direct payments of public funds or whether relief, non-monetary in nature, but still requiring vast expenditures of public funds is similarly prohibited.

This Court's opinion in *Larson, supra,* clearly suggests that the sovereign's immunity generally bars relief requiring a governmental officer to affirmatively exercise the powers of sovereign. *Hawaii v. Gordon,* 373 U.S. 57 (1963); *Dugan v. Rank,* 372 U.S. 609 (1963); *Malone v. Bowdoin,* 369 U.S. 643 (1962); *Land v. Dollar,* 330 U.S. 731 (1947); *Ex parte New York,* 256 U.S. 490 (1921).[24]

While this issue appears to be novel in its presentation to this Court, authorities since *Ex parte Young* lend

"No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers; but cash refunds of taxes, licenses, fees, and other charges paid or collected, but not legally due, may be paid, as provided by law, without appropriation from the fund into which they were paid on warrant of the proper officer."

[24] While appellants have found no case in this Court which either affirmatively or negatively applies this proscription to cases involving the Eleventh Amendment a number of lower federal courts have discussed the issue. See *Ad Hoc Committee on Judicial Administration v. Massachusettes,* 488 F. 2d 1241 (1st Cir. 1973); *Frye v. Lukehard,* 364 F. Supp. 1379 (W.D. Va. 1973); *Parker v. Mandel,* 344 F. Supp. 1068 (D. Md. 1972); *James v. Almond,* 170 F. Supp. 331 (E.D. Va. 1959); *Kansas City Southern Railway Co. v. Morley,* 88 F. Supp. 300 (W.D. Ark. 1950).

credence to the Proposition that the Eleventh Amendment does bar injunctive relief which would require a state official to act affirmatively, at least when such actions would be required to retroactively remedy a previous denial of constitutional rights:

> "The general discretion regarding the enforcement of laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment to the injury of complainant. *In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do.*" *Ex parte Young,* 209 U.S. at 159 (emphasis supplied).

It is true that this Court has required state officials to take affirmative steps to prospectively remedy unconstitutional procedures or situations.[25] *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218 (1964); *Graham v. Richardson,* 403 U.S. 365 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970). The orders in these cases are actually no different than the prospective aspect of *Edelman* which allows only "an ancillary effect on the state treasury". Thus, a federal court clearly may grant prospective injunctive relief to cure existing constitutional infirmities and such relief may, as an ancillary effect, impose some burden on officials of the sovereign to individually take appropriate affirmative actions.[26]

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[25] See discussion of *Wolff v. McDonnell, supra.*

[26] In *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952), this Court upheld an injunction restraining the Secretary of Commerce from "continuing the seizure and possession of the plant." The injunction issued against a federal officer was by its language prospective in effect.

However, this Court has never sanctioned an injunction which would require a state officer in his official capacity, to take an affirmative act, retroactive in effect, in order to grant a newly pronounced right previously withheld. The court below requires precisely such sovereign acts in mandating the discharge or release of all previously committed juveniles.

It is therefore necessary that this Court note jurisdiction in this case to resolve the grave questions herein raised which are fundamental to the basic concepts of federalism embodied in our Constitution.

CONCLUSION

Based upon the foregoing arguments and authorities it is requested that this Court note jurisdiction in this appeal, receive full briefs on the merits, and hear oral arguments in order to resolve the substantial questions which are involved.

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IN THE SUPREME COURT OF THE UNITED STATES

No. A—

Jack B. Kremens, et al.,
Appellants

v.

Kevin Bartley, et al.,
Appellees

CERTIFICATE OF SERVICE

I, NORMAN J. WATKINS, Deputy Attorney General, do hereby certify that I have served by United States Mail, postage prepaid, first class, on this date, Tuesday, January 27, 1976, three copies of Appellants' Jurisdictional Statement and Appendix to David Ferleger, Esquire, Counsel for Appellees, at 1315 Walnut Street, Suite 1600, Philadelphia, Pennsylvania 19103. I further certify that all parties required to be served in this appeal have been served.

(s) NORMAN J. WATKINS
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